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NOTE AND COMMENT

SPECIAL ASSESSMENTS UPON CEMETERIES.—Though the power to tax cemeteries would seem to be entirely clear, very commonly land devoted to such purpose is declared by constitution or statute to be exempt. See COOLEY, TAXATION, (3rd ed.) 354. So also in the case of special assessments such land, in the absence of a clear exemption, is liable thereto. *Bloomington Cemetery Assoc.* v. *People,* 139 Ill. 16, 28 N. E. 1076; *Mullins* v. *Cemetery Assoc.,* 239 Mo. 681, 144 S. W. 109; *Buffalo City Cemetery* v. *Buffalo,* 46 N. Y. 503; *Lima* v. *Lima Cemetery Assoc.,* 42 Oh. St. 128, 51 Am. Rep. 809. It may be suggested, in view of the theory upon which special assessments go, that the owner of the land gets back the amount assessed in benefits from an enhanced value of the property, land dedicated to cemetery purposes perpetually would not be subject to such assessments. This contention was urged in *Garden Cemetery Corporation* v. *Baker,* 218 Mass. 339, 105 N. E. 1070 (1914), and under the facts there presented was rejected, the court distinguishing *Mount Auburn Cemetery* v. *Cambridge,* 150 Mass. 12. Where all the lots are sold and used for burial and under the law the company cannot divert the land to other uses, perhaps the argument might be difficult to meet. Exemption from special assessment, then, in general, it would seem, must be found, if at all, in some provision or provisions of the

constitution, statutes, or charter, or in some inherent difficulty in the collection of the assessments.

Exemption from "assessments," it is held, will exempt from special assessments. *State* v. *St. Paul,* 36 Minn. 529, 32 N. W. 781; *In re New York,* 192 N. Y. 459, 85 N. E. 755; *Swan Point Cemetery* v. *Tripp,* 14 R. I. 199. But an exemption from "taxation" does not have the same result. *Bloomington Cemetery Assoc.* v. *People, supra; Lima* v. *Lima Cemetery Assoc. supra; Mullins* v. *Mount St. Mary's Cemetery Assoc., supra.* And in *Baltimore* v. *Green Mount Cemetery,* 7 Md. 517, it was held that a statute providing that land forever appropriated and set apart as a cemetery so long as used as such "shall not be liable to any tax or public imposition whatsoever," did not exempt from special assessments. As to the effect of an exemption from "execution" the courts are not agreed. That such exemption includes special assessments was held in *In re Sixth Ave. West, Seattle,* 59 Wash. 41, 109 Pac. 1052, where the statute provided that any part of a burial ground appropriated as burying place for any particular person or family "shall not be liable to be taken or disposed of by any warrant or execution, for any tax or debt whatever," the court, however, holding the unsold portions of the cemetery liable to the assessment; and in *Union Dale Cemetery Company's Case, 227* Pa. St. 1, 75 Atl. 835, where the charter of the company exempted the land of the company and the burial lots therein "from execution, attachment, taxation, or any other lien or process." In the latter case the court said that a confirmation of the assessment would mean the fastening of a lien on the land, which if not paid would lead to a sale, for "the right of lien includes the power to sell, else the lien would be a nullity." On the other hand it has been held that such exemption from execution does not include special assessments. *Bloomington Cemetery Assoc.* v. *People, supra,* holding such exemption only relieves from sale on *fi. fa.; Mullins* v. *Mount St. Mary's Cemetery Assoc., supra; Lima* v. *Cemetery Assoc. supra,* holding that there could be no sale to pay the assessment, but that the city could collect "by appointment of a receiver, by sequestration, or such other appropriate remedy as equity may afford, without in any way disturbing the resting place of those reposing in 'the city of the dead'." There was a statute in Ohio which gave remedy for recovery of the assessment by action. See *infra.*

The main question came before the Supreme Court of Michigan in *Woodmere Cemetery Ass'n.* v. *Detroit,* (Sept. 26, 1916), 159 N. W. 383. The cemetery Association having failed to pay a special assessment for paving a street upon which the cemetery abutted, the city sold the land and bid it in, there being no other bidders. The association by bill in equity asked to have the sale set aside and to remove the cloud created by the apparent liens held by the city. The lower court granted the relief prayed for, holding that the city had not proceeded according to law in levying the assessment and that the cemetery property was exempt from any such sale. By an evenly divided court the Supreme Court affirmed the decree. The four judges for affirmance went on the ground that land used for cemetery pur-

poses was "exempt from the particular tax by virtue of a settled state policy evidenced by the provisions in the charter of complainant and in other state statutes." The other judges while agreeing that the land could not be sold for the purpose of collecting the assessment, were of opinion that the land was subject to the assessment which should be collected by way of a decree that such special assessment was a debt due from the association to the city.

HOWELL'S MICH. STATUTES, § 13025, provide that "all cemeteries, tombs, and rights of burial, while in use as repositories of the dead" shall be "exempt from levy and sale under any execution, or upon any final process of a court." It was upon this statute, upon the case of *Avery* v. *Forest Lawn Cemetery Co.*, 127 Mich. 125, 86 N. W. 538, applying the statute in an action seeking a sale of cemetery land to pay a debt, and upon the limitations on the association's power to sell and use the land for nothing but cemetery purposes, that the prevailing judges relied in holding the land exempt from the assessment.

That the cemetery should be exempt from *sale* would seem, for obvious reasons, a very proper conclusion. No doubt a court would be astute to find ground on which to base such a determination. But does it necessarily follow that because the land is held exempt from sale that therefore there is no liability for such assessments? In DILLON, MUNICIPAL CORPORATIONS, (§ 822) on the basis of *McInerny* v. *Reed*, 23 Iowa 410, it is said that "where the charter of a city conferred upon it the power 'to levy and collect' a special tax for local improvements and declared such tax to be *'a lien'* upon the real estate upon which it should be assessed, and no mode of collection was prescribed, and no power to collect by sale existed, the court was of opinion that the lien might be *enforced in equity*, and the power 'to collect' be exercised by the corporation by a suit in its name." This was approved and adopted by the Ohio court in *Lima* v. *Cemetery Assoc.*, *supra*. But in *Cave Hill Cemetery Co.* v. *Gosnell*, 156 Ky. 599, 161 S. W. 980 (1913), in an action on a warrant against the Cemetery Company for its part of the cost of paving a street, the lower court held the cemetery subject to the lien, though not subject to a sale therefor, on the authority of *Louisville* v. *Nevin*, 10 Bush. 549, and ordered the company, it appearing that it had funds, to pay the amount of the assessment into court within twenty days. The Supreme Court reversed the decision, saying that "To require the cemetery company to pay the apportionment warrant when its land is not subject to a lien would be in effect to make the owner of the property personally liable for the amount sued for. But we have often held that the owner is not personally liable for the cost of a street improvement. * * * To require the cemetery company to pay the money into court is only in another form to subject its property to a lien. All the funds in the hands of the cemetery company are held in trust to maintain the cemetery and to require these funds to be paid out for other purposes is to require the trustee to divert the funds from the trust to which they were dedicated."

However it may be in cases of the character just referred to, there would seem to be no reasonable basis for denying the power of the legislature, in

the absence of constitutional restrictions, to provide for the recovery of the amount of such assessments by appropriate actions designed to that end. The exemption, to whatever extent it is granted, is wholly a matter of favor, which can be extended upon such terms as the legislature may see fit. The Ohio statute (§ 3898, P. & A. ANN. GEN. CODE) which provides that *any* unpaid special assessment may be recovered by suit against the landowner was upheld as constitutional in *Hill* v. *Higdon,* 5 Oh. St. 243; *Gest* v. *Cincinnati,* 26 Oh. St. 275. Of course if *all* of the funds of the cemetery company were held in trust for special purposes, the remedy may be of no avail.

The Detroit city charter (§ 221) provides that "the said receiver shall have power in the name of the city of Detroit to prosecute any person refusing or neglecting to pay such taxes or any special assessment by a suit in the circuit court for the County of Wayne, and he shall have, use, and take all lawful ways and means provided by law for the collection of debts, to enforce the payment of any such tax or any special assessment." Assuming the validity of such charter provision, may it not well be that by a proceeding thereunder and the assistance of the powers of a court of equity along the line of the doctrine of *McInerny* v. *Reed, supra,* and *Lima* v. *Cemetery Assoc., supra,* it would be possible to reach non-trust funds of the Association?

R. W. A.

THE RIGHT TO EMPLOY INCONSISTENT DEFENSES.—The case of *McAlpine* v. *Fidelity and Casualty Company of New York,* 158 N. W. 967, decided July 28, 1916, by the Supreme Court of Minnesota, sets forth clearly what should be the modern doctrine respecting inconsistent defenses. In an action on an accident policy for death resulting through accidental means, the defendant alleged that the death was caused by suicide and further that it was caused by the beneficiary. The court denied the plaintiff's motion that the defendant be required to elect upon which claim it would rely, the motion being based upon the ground that the two defenses were inconsistent. The Supreme Court held that the ruling of the lower court was correct.

The Minnesota statute reads as follows: "The defendant may set forth by answer as many defenses and counterclaims as he has. They shall be separately stated, and so framed as to show the cause of action to which each is intended to be opposed." (R. L. 1905, § 4132, G. S. 1913, § 7758). This provision is very similar to that found in many other state codes, and nowhere does it make the requirement of consistency among defenses. Whatever rule has come to be effective, is the result of construction, and under earlier Minnesota decisions the rule was established that separate defenses must be consistent. *Booth* v. *Sherwood,* 12 Minn. 426; *Stevenson* v. *Waterbury,* 52 Minn. 211, 53 N. W. 1146; *Rees* v. *Storms,* 101 Minn. 381, 112 N. W. 419.

The common law rule was that a defendant could plead only one defense without infringing the rule against duplicity. By the statute of 4 Anne, a party was allowed "to plead as many several matters thereto as he shall